Supreme Court, U.S.
FILED

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No. 97-

In The

Supreme Court of the United States

October Term, 1997

MR. RENE' JOSEPH MARTIN, PRO SE

Petitioner,

v.

MR. WILLIAM S. COHEN, SECRETARY
DEPARTMENT OF DEFENSE, DEFENSE
CONTRACT AUDIT AGENCY, et al.,

Respondent,

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

Mr. Rene' Joseph Martin
115 Prince Avenue
Melbourne, FL 32901
407-723-0839
Pro Se

July, 1997

QUESTION PRESENTED

Issue 1

Should the respondent be rewarded for abusing disabled petitioners rights? Counsel for the respondent acted to interfere and delay, in the process of law, causing an unreasonable loss of petitioners due process rights, granted by the amendments, and case law cited.

Issue 2

Should the district court be allowed to toll and disregard rules? The district court allowed it's own rules to be tolled in favor of the respondent.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Federal Circuit were Petitioner Mr. Rene' J. Martin, Pro Se and Mr. William S. Cohen, Secretary, Department of Defense , Defense Contract Audit Agency, et al., Respondent.

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96-2161 MARTIN v. COHEN, et. al. Per Curiam: Affirmed Un-published. United States Court of Appeals for the Eleventh Circuit Opinion of the United States Court of Appeals for the Federal Circuit (April 24, 1997)

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94-450-CIV-ORL-22 MARTIN V. WILLIAM PERRY ET. AL. United States District Court. Memorandum Opinion and Order of the United States District Court (Jan. 10,1996)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mr. Rene' J. Martin respectfully prays and petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix (A.1.) ordered, "Do Not Publish". The opinions of the district court are reported at Appendix (A.2.).

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

Pursuant to 11th Cir. R. Addendum Five, section (d)(3) provides: "In the event of affirmance or other decision adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filling for writ of certiorari with the Supreme Court. Counsel are also reminded that section (d)(4) of Addendum Five provides: "Appointed counsel shall advise the party represented in each case that, if the party wishes to file a petition for writ of certiorari with the Supreme Court, the party may have the right to do so without prepayment of and costs or giving security therefor.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Issue 1

Article V and XIV, Section 1, of the Amendments to the Constitution states that, "No state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The judgment should be reversed because agency counsel, became wrongfully involved with Mr. Martin's MSPB Appeal thus interfering with his right to due process by ordering a clerk to send petitioners appeal papers to his office in Virginia, delaying the return of the papers from June 7, to June 17, 1994, for ten days.

Issue 2

Whether the judgment for defendant should stand after the district court allowed local rules and orders to be tolled in favor of the defendant and to the disadvantage of the petitioner.

The district court violated its own rules & orders. The respondent failed to answer the complaint in a timely manner, and did not answer the complaint for 293 days after the complaint was filed, which should have been answered in 60 days. The district court also allowed the filing of a 12(B) motion on the sixty first day after the complaint was filed requesting summary judgment. The court further allowed depositve motions after time for filing had passed and then again allowed the rules and time constraints to be tolled for page length limitations.

STATEMENT OF THE CASE

Petitioner, Mr. Rene' Joseph Martin, a 50% disabled veteran and former federal employee sued William J. Perry, the Secretary of the Department of Defense, for handicap based employment discrimination and retaliation for filing a workers' compensation claim.

In 1986, Mr. Martin was hired by the Defense Contract Audit Agency (DCAA), a component of the Department of Defense. He was terminated from his position as a contract auditor effective May 17, 1991.

He asserted two claims. His first claim was that DCAA refused to accommodate his handicap. His second claim is that he was terminated in retaliation for having filed a workers' compensation claim.

By means of the termination memorandum, Mr. Martin was notified that he could challenge his termination by means of an MSPB Appeal within 20 days of the effective date of his termination, or by means of an EEOC Complaint within 30 days, but that he could not pursue his grievance through both avenues.

The appeal was delivered to DCAA on June 7, 1991. That day, a DCAA Marietta, GA. clerk, was ordered to send the appeal to DCAA's legal counsel, in Virginia. DCAA's counsel, returned the appeal to Mr. Martin's attorney 10 days later who received it on June 17, 1991, with an explanation that the MSPB's Atlanta Regional Office, and not the DCAA, was the proper place to file the appeal.

Mr. Bley, DCAA Legal Counsel stated it took 3 days for the appeal to arrive in Virginia and 7 days to return it to petitioners attorney. Mr. Martin's counsel received the document on June 17, 1991, and filed the appeal with MSPB Atlanta, on June 18. Meanwhile, the petitioner in an effort to preserve his rights to appeal, contacted an EEOC counselor on June 17, 1991, attempting to file an EEOC complaint with DCAA, to comply with the 30 day time frame allowed by the rules.

DCAA rejected Mr. Martin's separate EEOC complaint on the basis that, having first elected to pursue his appeal with the MSPB, Mr. Martin could not challenge his termination by means of an EEOC complaint. Mr. Martin appealed the agency's decision to the EEOC, which affirmed the rejection, However: the EEOC only considered the timing of Mr. Martins' initial call to the EEOC counselor and the eventual filing of his EEOC complaint. Not the issue of interference by agency counsel. On March 23, 1994, the EEOC denied Mr. Martin's request for reconsideration. Petitioner filed suit in the District Court the following month.

ISSUE 1

Mr. Bley interfered with Mr. Martin's right to due process The question is what legal wrong did plaintiff suffer from agency counsel action or in-action. Petitioner argues a fraud, misrepresentation, interference, or other misconduct of the adverse party by agency counsel to deprive petitioner the alternative action of filing a timely EEOC complaint. The clerk was ordered to send the appeal to DCAA counsel whereby he returned it on the last day to file the alternative action with the EEOC.

The question arises why did agency counsel order the clerk to send the appeal to Virginia only to return the appeal 10 days later? Had counsel acted in good faith the appeal would have been returned from the clerks office in Atlanta and not sent to Virginia. Counsel acted negligently by taking control of the appeal, thus knowing it would arrive too late for alternative action to be taken by petitioner. This action or in-action to act responsibly resulted in petitioner having no recourse to have his case heard based upon it's merits. Had the clerk returned the appeal there would have been seven days available for the petitioner to act and enter a timely EEOC complaint. Rule 60(b)(1) authorizes the court to give relief from a judgment, order, or proceedings for mistake, inadvertence, surprise, or excusable neglect.

Two issues can be summarized. (1) The delay to file in one of the two administrative forums was delayed by a clerical error, confounded by DCAA counsel, (2) If agency counsel had acted in good faith the outcome would have resulted in no delay. Rule 60 (b)(3) was added in 1948 to make it clear that a motion will lie for relief from a judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party. It is clear Mr. Bley, was either extrinsically guilty of fraud or acted under the guise of misconduct by ordering the clerk to divert the appeal papers to his office.

Respondent had the courts believe that since he was able to control the diversion of the initial MSPB appeal from Atlanta to Virginia, for 10 days only to return the documents after enough time had passed to preclude further action, that they should be rewarded by the granting of summary judgment based upon a fraudulent act and if not fraud the least it could be characterized as would be misconduct.

ISSUE 2

The District Court Violated Rules & Orders The respondent failed to answer the complaint in a timely manner. They did not answer the complaint for 293 days after the complaint was filed. The rules provide 60 days to answer the complaint. They then filed a 12(B) motion on the sixty first day after the complaint was filed requesting summary judgment.

The F.R.Civ.P. are specific on the timing of 12(b) motions which states that if a party decides to raise any of the seven enumerated defenses by motion, it "shall be made before pleading if a further pleading is permitted." In Orange Theater Corp. v. Rayherstz Amusement Corp., C.A.3d, 1944, 139 F2d 871, 874, certiorari denied 64 S.Ct. 1057, 322 U.S. 740, 88 L.Ed. 1573, the court stated: "If the defense or lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules." (Maris, J.) stated again in Kucharski v. Pope & Talbot, Inc., D.C. NY. 1944, 4 F.R.D. 208. In Stewart v. US. C.A. 7th, 1952, 199 F.2d 517 certiorari denied 71 S.Ct 1000, 341 U.S. 940, 95 L.Ed. 1367. After the court of appeals reversed the granting of summary judgment in favor of the United States, the government, in its petition for certiorari, sought dismissal on the basis of lack of jurisdiction on the ground that the plaintiff's claim fell within the exception of the to the Tort Claims Act, 28 U.S.C.A. S/S 1346(b), under which plaintiff was seeking relief. Certiorari was denied and the government renewed its objection in the district court, which rejected the defense."

On appeal, the Seventh Circuit held that the statutory exceptions were to be treated as defensive matter, and did not raise an issue of subject matter jurisdiction. Viewed from this perspective, the defenses were waived by defendant's failure to assert them earlier. In this case the defense has waived his right to assert a 12(b) motion because he did not assert them in a timely manner not only prior to his answer but after the time to answer, and after time to file a 12(b) motion had expired.

The district court also consented to extend the time for filing an unopposed dispositive motion, for 5 days. Which turned out to be 8 days because of a week-end and a federal holiday. On the day the dispositive motion for summary judgment was due the respondent submitted a motion to exceed page length limitations. This violated F.R.Civ. P. Local Rule 3.01(c), which states "Absent prior permission of the court, no party shall file any brief or legal memorandum in excess of (20) pages in length." The respondent also violated, and the court allowed a tolling of the rules, as stated in the Case Management and Scheduling Order. Item G, "Motions for extension of time and for relief from page limitations will not be granted without a showing of good cause. The time for compliance with deadlines established by rule or order will not be tolled by the filing of a motion for extension of time." Petitioner knew of no reason why the court should toll the defenses failure to abide by the rules and orders.

The district court allowed the defense to use its first unopposed extension of 8 days to prepare its dispositive motion.

When the motion was filed in excess of the page limitations the court granted the respondent 5 additional days to re-do and resubmit its motion for Summary Judgment. Contravening it's own rules and orders. Petitioners Motion to Quash or Strike Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment was ordered moot.

Petitioner Martin exhausted all administrative remedies. The respondent asserted that, "Although plaintiff followed administrative channels, he failed to exhaust his administrative remedies." and then states "The question for the court, then, is whether Mr. Martin has in fact exhausted his administrative remedies." Petitioners argument is that all possible administrative review has taken place. Petitioners appeal to the MSPB was wrongfully displaced by agency counsel causing alternative actions to be denied him by agency interference. It is clear that the delay caused by Mr. Bley, was a meaningful and deliberate interference. Mr. Martin continued to defend his case. and has continually worked to obtain justice.

Petitioner was given no other recourse than to work to clear his name, work record, and reputation. It is for this reason that Mr. Martin continues to pursue his rights of petition to have his case heard based upon the merits. To understand this case one must consider the facts and determine if justice was served or was the agency working to obstruct justice. The court has a right to Administrative Review via the Ripeness Principles and The Administrative Procedures Act via Section 702 of Title 5 of the United States Code which grants judicial review to a person who

suffers legal wrong from agency action.

In reviewing a district court's decision on a motion for a judgment as a matter of law under Rule 56, the appellate court should have applied the same standard as the district court. The district court and appellate court both misapplied their authority by accepting the decision of the agency's MSPB when facts were presented clearly indicating agency counsel acted beyond his scope of authority and beyond a showing of good faith by interfering with petitioners appeal. "Agency administrative decisions are subject to judicial review in a trial de novo in actions brought under 29 USC S/S 791, in which administrative findings are admissible as evidence." Prewitt v United States Postal Service 662 F2d 292(5th Cir 1981).

The district and appellate court held that the agency's action, findings and conclusions were correct, when in fact they should have been held unlawful and set aside for the reasons set forth in 5 U.S.C. 706(2). "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-(1) compel agency action unlawfully with-held or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
(B) contrary to constitutional right, power, privilege, or immunity .
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rules of prejudicial error."

Furthermore, under Federal Rules 60(b) and Rule 55(c) the standards for determining whether relief from a default entry or judgment should be granted. States, that an entry of default may be set aside "for good cause shown." But when a default judgment has been entered, Rule 55(c) refers to Rule 60(b), which provides that relief from a final judgment may be granted for: (1) mistake, inadvertence, surprise or excusable neglect and (3) fraud, misrepresentation, or other misconduct of an adverse party.

REASONS FOR GRANTING THE PETITION

I. The Petition Raises Important Civil Rights and Handicapped Employee Issues

The Court has held that "Interference" by employer with employees for engaging in activities protected by Labor Management Relations Act is no less interference because it is accomplished through allurements rather than coercion. N.L.R.B. v. West Coast Casket Co., C.A., 206 F.2 d 902,905. Considering the total amount of time available for an employee to act, 20 days for a MSPB appeal and 30 days for an EEOC complaint, and comparing that to how long agency counsel induced the documents to be interfered with, the results are 50% and 30% respectively. 10 days is a material amount of time. It is precisely this relevancy the district and appellate courts failed to find upon.

The judgment for failure to exhaust administrative remedies must be reviewed because agency counsel became illegally involved with Mr. Martin's MSPB Appeal and Process and interfered with petitioners right to due process. The quintessential fact is that DCAA controlled the appeal and process, exploiting Mr. Martins due process rights by sending and holding the appeal in Virginia for (10) days.

The original appeal was sent to the wrong address ,and was sent other than by the US Mail, thus it was considered one day late, however; the alternative option of filling a timely EEOC complaint would still have been a viable alternative. "Interfere" bears the significance of disarranged, disturbed, hindered. In Haggerty v. Associated Farmers of Cal., 279 P.2d 734,741, 44 C.2d 60. an "Interference" by employer with employees for engaging in activities protected by Labor Management Relations Act is no less interference because it is accomplished through allurements rather than coercion. N.L.R.B. v. West Coast Casket Co., C.A., 206 F.2 d 902,905. and "Interference" by employer with employees for engaging in exercise of rights under National Labor Relations Act is no less interference because it is accomplished through allurements rather than coercion. Western Cartridge Co. v. National Labor Relations Board, C.C.A., 134 F2d 240,244.

It would be understandable to take 3 days to return the appeal to appellant's attorney, as was stated by Mr. Bley, if he returned it the day he received it. That accounts for 6 days. Using the agency argument there are still 4 days unaccounted for. The fact respondents counsel became involved in the business between Martin and the MSPB is questionable, more over, is the loss of the additional unexplained 4 days.

The moment Mr Bley, interfered with and in the process Mr. Martin's rights were breached. Respondents counsel, had no business interfering with Martin v. MSPB. His argument that he wanted to inform appellant of the proper place to file the document could have been done by the clerk at DCAA Atlanta.

The egregious action by agency counsel although an, "allurement" was none the less an interference. The fact the papers were returned on June 17, the last day to take any alternative action only added to the confusion. The district court held that the delay rests squarely on petitioners shoulders, is not true. It was never Mr. Martins intent to file both an appeal with the MSPB and a complaint with the EEOC. On June 17, the only intent, was to do what ever possible to preserve petitioners rights. With the loss of the critical 10 days Mr. Martin and counsel had no alternative but to re-act to a situation that was forced upon them by DCAA's counsels illegal act of interference.

What transpired after agency counsel interfered with the appeal procedure and process is moot. The judiciary declined to recognize the seriousness of this act of interference which may or may not have been by design, however, the results were just as destructive to petitioners rights.

The District Court failed to act but did recognize at Dkt. 59-7 stating

> "[U]pon determining that the employee in fact complied with the regulations (or <u>was prevented by the agency from doing so</u>) and that the agency therefore rejected the ... complaint without cause, the court should not direct the employee... to return to the agency to give the agency a second opportunity to resolve the dispute but should <u>conclude that administrative remedies are exhausted</u> and go on to try all issues in the case on their merits. Of course, if the court determines that the employee did

> not properly present his or her claims so as to afford the agency an opportunity to resolve the dispute, then summary judgment in favor of the defendant is in order. Resort to the district court protects employees, while ensuring that they are not encouraged to circumvent administrative process."

It is petitioners argument that the interference by counsel, which resulted in a delay of 7 to 10 days, is in fact proof that petitioner Martin "was prevented by the agency from doing so and complying with the regulations." The administration of justice in this case rests on two factors. The courts right to Administrative Review via the Ripeness principles and The Administrative Procedures Act via Section 702 of Title 5 of the United States Code which grants judicial review to a person who suffers legal wrong from agency action.

To understand the case one must look into the facts and determine if justice was served or was the agency, through its counsel working to obstruct justice.

Administrative Review & the Ripeness principle:

> "Courts seek to strike a balance between competing forces. They should not intrude into matters that are better left to ongoing administrative disposition, but they must discharge their own functions as essential participants in an integrated regulatory process."

Furthermore, Under S/S 702 Right of review a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the

ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

Under Federal Rules 60(b) and Rule 55(c) the standards for determining whether relief from a default entry or judgment should be granted. Says," that an entry of default may be set aside "for good cause shown." But when a default judgment has been entered, Rule 55(c) refers to Rule 60(b), which provides that relief from a final judgment may be granted for: (1) mistake, inadvertence, surprise or excusable neglect and (3) fraud, misrepresentation, or other misconduct of an adverse party, i.e. interference."

What legal wrong did Mr. Martin suffer from agency action or inaction caused by an officer. Petitioner asserts a fraud, or interference, misrepresentation, or other misconduct of the adverse party perpetrated by agency counsel to deprive him the alternative action of filing a timely EEOC complaint within thirty days. The agency clerk, in Atlanta, had three options: return the incorrectly addressed appeal to petitioner Martin, forward the appeal to the MSPB in Atlanta, or send the appeal to agency counsel in Virginia.

The clerk was ordered to send the appeal to counsel whereby he returned it, on the last day to file the alternative action with the EEOC. The question arises why did agency counsel order the clerk to send the appeal to Virginia only to return the appeal 10 days later? Had counsel acted in good faith the appeal would have been returned to Mr. Martin from the clerks office in Atlanta and not sent to Virginia. If agency counsel had acted in good faith the outcome would have resulted in no delay. Rule 60(b)(3)

was added in 1948 to make it clear that a motion will lie for relief from a judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party.

> The Advisory Committee Note to the 1948 amendment of Rule 60(b) said in part: "Fraud whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a 'reasonable time' which might be after the time stated in the rule had run. Fisk v. Buder, C.C.A. 8th, 1942, 125 f.2d 841; see also inferentially Bucy v. Nevada Construction Co. C.C.A. 9th, 1942, 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, Effect of Rule 60(b) on Other Methods of Relief from Judgment, 1941, 4 Fed. Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, Federal Relief from Civil Judgments, 1946 55 Yale L.J. 623, 653-659; 3 Moore's Federal Practice, 1938, 3267 et seq. and the rule does limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 322 U.S. 238, 64 S.Ct. 997." The full note appears in the Appendix to the volumes on Civil Rules and at 5 F.R.D at 479. Obtaining a judgment are ordinarily sufficient. grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case."

The principles that govern the motion were well stated by the Eighth Circuit in a case decided even before Rule 60(b)(3) was adopted. "The proceeding by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of

law; yet the relief is equitable in character and must be administered upon equitable principles." Fraud and or circumvention become clear to the court when viewed that agency council acted in a pattern that was fraudulent, misrepresentation or misconduct. For what reason did Agency Counsel become involved in business between the appellant and the MSPB if not to act to delay? And if not to act to delay than why did agency counsel not order the clerk to follow one of the other two alternatives? (1) To forward the appeal to the MSPB who had jurisdictional authority over the matter or (2) To immediately return the papers to Martin for further administrative action? The answer is clear, agency counsel interfered and by doing so was inexcusably denying Petitioner his opportunity to have his case heard based upon its merits. Rule 60(b)(1) Sates, Relief from a default judgment may be granted upon a showing that it was a result of "mistake, inadvertence, surprise, or excusable neglect." This provision has been applied in a wide variety of circumstances, most of which involve reasons for the default that might be characterized as "excusable" on the basis of the showing made by the movant through affidavits or other evidence.

DCAA would have the court believe that since agency counsel was able to control Mr. Martins appeal pertaining to the diversion from Atlanta to Virginia and then back to plaintiff, they should be rewarded by summary judgment based upon a fraudulent act and if not fraud the least it could be called would be misconduct.

The laws that grant the court the right to Administrative Review via the Ripeness Principle and The Administrative Procedures Act via Section 702 of Title 5 of the United States Code, grants judicial review to a person who suffers legal wrong from agency action. These rules are reinforced by Federal Rules 55 and 60(b). Which taken together grant relief from the causes that were claimed by the agency concerning; delays, fraud and or misconduct, and excusable neglect.

The lower courts failed to appreciate the significance of the interference to the appeal process which resulted in a definite denial of Petitioners rights to due process. As was stated, everything that occurred after Mr. Bleys interference and intervention is moot. The statement, "What Martin fails to appreciate... is that [DCAA] was under no obligation to call him, and even if it had, the appeal would still have been untimely since the deadline for filing was June 6."

True the appeal would have been late, however, the options in Martin's due process rights, such as pursuing a timely EEOC complaint were taken away due to the delay and subsequent interference caused agency counsel. The agency did have the obligation and responsibility to act as a reasonable person would act. Delaying the return of the appeal from 7 to 10 days was a negligent and unreasonable interference resulting in a denial of petitioners rights.

The district court continues stating, "Concerning the EEOC claim, Martin relinquished the right to pursue that claim of discrimination by virtue of his prior pursuit of the MSPB appeal. Martin filed his MSPB appeal on June 18, 1991. Although he sought EEOC counseling on June 17, 1991, he did not file a formal EEOC claim until July 22, 1991. Petitioner was not informed it would take 6 to 8 weeks to conduct an investigation and then finally submit a "Final Report" again to DCAA legal Counsel Mr. Bley who represented DCAA for all EEOC maters. Again the court failed to appreciate that everything that was done by petitioner Martin, with the MSPB, and the EEOC was the result of agency counsel delaying and interfering with the initial misdirected appeal that was "held hostage", 7 to 10 days by DCAA Counsel.

The return of the appeal on the 17th of June, the last day to take any action motivated petitioner and his counsel to do what ever possible to preserve due process rights. It is petitioners belief that agency counsel was knowledgeable and competent

in the rules and regulations concerning the MSPB and EEOC.

> "The court must keep in mind that the purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires. See Mangiapaine v. Adams, 661 F.2d 1388, 1390-91 (D.C. Cir. 1981) (agency should play a major role in developing record). If the employee is hampered by the actions of the agency or complaints examiner or by the unavailability of any discovery procedures, he or she should not be deemed thereby to have failed to comply with exhaustion requirements." Wade v. Secretary of the Army, 796 F.2d 1377 (11th Cir. 1986).

An act by learned counsel to interfere and delay the movement of vital documents for 7 to 10 days, could not be considered a good faith effort. The reliance of the district court to believe that DCAAs' counsel, a trained legal representative, would ask any court to believe that he was acting in good faith does not serve the cause of justice. This is why Petitioner Martin, prays this court recognizes the flaw in the lower courts evaluation and finds for the Petitioner.

ISSUE II

The district court allowed rules and orders tolled in favor of the Respondent. The court decided in favor of the defense because they held a belief that DCAA was correct in its decisions. In U.S. v. Ferretti, 635 F2d 1089, on remand 508 F. Supp. 913. Stated, "Courts and agencies have discretion in adopting rules of procedure, but once promulgated, such rules cannot be ignored unless and until they are effectively repealed." and, "Is is just as incumbent on the District Court, as it is for any other agency that promulgates rules and procedures, to abide by the rules.

The district court improperly granted the respondent a leave to take back its unopposed and delayed initial dispositive motion, then on second presentation disregarded petitioners motion to quash. The court then authorized a further extension of time to circumvent the rules of page limitations and prior permission, twice violating its own rules and orders. This is strong evidence the district court was obliging the respondent, District Attorney and the agency by accepting DCAA's decisions over clear evidence and material facts provided in petitioners motions when petitioning and moving the court.

Should the judgment for the respondent stand after the district court allowed local rules and orders to be tolled in favor of the defendant and to the disadvantage of the petitioner?

The Defense failed to answer the complaint in a timely manner and did not answer the complaint for 293 days after the complaint was filed.

The defense also waved it's right to question the petitioners rights on jurisdictional grounds. By filing a 12(B) motion on the sixty first day after the complaint was filed requesting summary judgment. The F.R.Civ.P. are specific on the timing of filing 12(b) motions, which state that if a party decides to raise any of the seven enumerated defenses by motion, it "shall be made before pleading if a further pleading is permitted." In Orange Theater Corp. v. Rayherstz Amusement Corp., C.A.3d, 1944, 139 F2d 871, 874, certiorari denied 64 S.Ct. 1057, 322 U.S. 740, 88 L.Ed. 1573, the court stated: "If the defense or lack of jurisdiction of the person is not raised by motion

before answer or in the answer itself it is waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules." (Maris, J.) stated again in Kucharski v. Pope & Talbot, Inc., D.C. NY. 1944, 4 F.R.D. 208. In Stewart v. US. C.A. 7th, 1952, 199 F.2d 517 certiorari denied 71 S.Ct 1000, 341 U.S. 940, 95 L.Ed. 1367. After the court of appeals reversed the granting of summary judgment in favor of the United States, the government, in its petition for certiorari, sought dismissal on the basis of lack of jurisdiction on the ground that the plaintiff's claim fell within the exception of the to the Tort Claims Act, 28 U.S.C.A. S/S 1346(b), under which plaintiff was seeking relief. Certiorari was denied and the government renewed its objection in the district court, which rejected the defense.

On appeal, the Seventh Circuit held that the statutory exceptions were to be treated as defensive matter, and did not raise an issue of subject matter jurisdiction. Viewed from this perspective, the defenses were waived by defendant's failure to assert them earlier. In this case the respondent waived his right to assert a 12(b) motion because he did not assert them in a timely manner not only prior to his answer but after the time to answer.

The district court also permitted the respondent to extend the time for filing a dispositive motion, unopposed by petitioner for 5 days. Which turned out to be 8 days because of a week-end and a federal holiday. On the day the motion was due the respondent submitted a Motion to Exceed Page Length Limitations at the same time the

Summary Judgment Motion was submitted. This violated F.R.Civ. P. Local Rule 3.01(c) "Absent prior permission of the court, no party shall file any brief or legal memorandum in excess of twenty (20) pages in length." The respondent also transgressed the rules as stated in the Case Management and Scheduling Order, Item G, "Motions for extension of time and for relief from page limitations will not be granted without a showing of good cause. The time for compliance with deadlines established by rule or order will not be tolled by the filing of a motion for extension of time."

The district court allowed the respondent to use its first unopposed extension of 8 days to prepare its dispositive motion. When this motion was filed in excess of the page limitations the court accorded the respondent an additional 5 days to re-do and resubmit its motion for Summary Judgment. Both violating it's own rules and stated Orders. Petitioners, Motion to Quash or Strike Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment was ordered moot. In US v. Radlick, 581 F. 2d 225. "C.A.Cal. 1978. The federal rules are designed as standards for federal officers, and it is the obligation of the officers to obey them.", and in Meza v. Washington State Dept. of Social and Health Services, 683 F 2d. 314. "C.A. Wash. 1992. Court of appeals would not countenance disregard of court rules, whether governing conduct and procedure in trial court or before the court of appeals.

In U.S. v. Ferretti, 635 F.2d 1089, on remand 508 F.Supp. 913. Stated, "Courts and agencies have discretion in adopting rules of procedure, but once promulgated, such rules cannot be ignored unless and until they are effectively repealed." and "It is

just as incumbent on the district court, as it is for any other agency that promulgates rules and procedures, to abide by the rules."

The district court granted the respondent leave to take back its once unopposed and delayed initial dispositive motion, disregarded petitioners motion to quash, then allowed a further extension of time to bypass the rules of page limitations and prior permission, twice violating its own rules and orders to the advantage of the respondent. This is strong evidence the district court was consenting to accept the agencies decision over the evidence and findings provided in petitioners motions to the court. Even though the defense was representing a department of the government, this does not excuse the respondent or the court to abide by their published rules.

CONCLUSION

The practice and doctrine that safeguarding an organization is more meaningful than protecting the rights of a disabled impaired employee is not a basis for law and justice. The reason the ADA was enacted was to protect the rights of the injured and disabled employees in addition to the rights of the organization. This case is about an agency counsel who worked to have a disabled employee terminated. That same counsel was then responsible for delaying a misdirected legal document for 7 to 10 days, resulting in a fundamental denial in petitioners appeal rights.

This case was brought to the district court and the court of appeals. Both courts held the duty and responsibility to recognize that an unlawful act had been committed by DCAA management by and through its counsel. Both courts failed to recognize prior

case law and decisions by numerous courts and jurisdictions pertaining to interference by opposing counsel.

The American Disability Act and other legislation and government regulations provide that the " Government shall be a model employer," in enacting and enforcing the rules and legislation to protect the handicapped and disadvantaged.

The district and appellate courts went out of there way to rely on prejudicial information to contravene the case law as presented. Mr. Bley, DCAA counsel was responsible for the initial, illegal termination of a disabled employee. When given a second opportunity to assure this illegal act should stand, Mr. Bley took it, by delaying private and important legal documents.

The district court breached its own rules and orders by providing circumstances for the respondent to disregard the courts rules allowing dispositive motions and granting additional time twice and once for the purpose of meeting page length limitations and mooting petitioners motions without any special circumstances being noted.

The 5th and 14th Amendments to the Constitution contain the general guarantee that no one shall be deprived of life, liberty, or property without due process of law. This Supreme Court has recognized that citizens have a constitutional right of privacy, drawn from the Bill of Rights, protecting the security of home and person. The DCAA violated the privacy of a person by interfering with important papers resulting in the loss of his position and right to redress a serious grievance.

This court has the opportunity to set right the understanding of the law as it applies to the handicapped. The petitioner prays the court will set right the thinking of the judiciary, the agency and other organizations that may be inclined to disregard the law, rules and regulations promulgated to protect our citizens and system of justice. As stated by the Honorable, Gordon Hewart, in a judicial decision in 1924. "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

The petition for a writ of certiorari should be granted.

Respectfully submitted.

By: R J Martin

Mr. Rene' Joseph Martin
115 Prince Avenue
Melbourne, Florida 32901
407-723-0839
Pro Se

July 23, 1997

No. 97-

In The

Supreme Court of the United States

October Term, 1997

MR. RENE' JOSEPH MARTIN, PRO SE
Petitioner,

v.

MR. WILLIAM S. COHEN, SECRETARY
DEPARTMENT OF DEFENSE, DEFENSE
CONTRACT AUDIT AGENCY, et al.,
Respondent,

PROOF OF SERVICE

I, Rene' Joseph Martin, do swear or declare that on this date, July 23, 1997, as required by Supreme Court Rule 29 I have served the enclosed MOTION AND PETITION FOR A WRIT OD CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Charles R. Wilson, United States Attorney, Mr. I Randal Gold, Assistant and Mr. Edward L. White III, Assistant. Room 201 Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 23 1997

R J Martin
Mr. Rene. J. Martin

APPENDIX A.1.

96-2161 MARTIN v. COHEN, et. al. Per Curiam: Affirmed Un-published. United States Court of Appeals for the Eleventh Circuit Opinion of the United States Court of Appeals for the Federal Circuit (April 24, 1997)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 24 1997
MIGUEL J. CORTEZ
CLERK

No. 96-2161
Non-Argument Calendar

D. C. Docket No. 94-450-CIV-ORL-22

RENE JOSEPH MARTIN,

Plaintiff-Appellant,

versus

WILLIAM S. COHEN, Secretary,
Department of Defense, Defense
Contract Audit Agency, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 24, 1997)

Before ANDERSON, COX, and BLACK, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.[1]

[1]Appellees' motion to strike the document included in Appellant's record excerpts at Tab 61 is GRANTED.

Appellees' motion to strike portions of Appellant's reply brief is DENIED.

APPENDIX A. 2.

94-450-CIV-ORL-22 MARTIN V. WILLIAM PERRY ET. AL.
United States District Court. Memorandum Opinion and Order
of the United States District Court (Jan. 10,1996)

FILED

95 JUN 10 AM 8:58

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RENE J. MARTIN,

Plaintiff,

-vs-

CASE NO. 94-450-CIV-ORL-22

WILLIAM J. PERRY,

Defendant.

_____/

ORDER

I. INTRODUCTION

The Plaintiff, Rene J. Martin, is a former federal employee. He has sued William J. Perry, the Secretary of the Department of Defense, for handicap-based employment discrimination and retaliation for filing a workers compensation claim. The Defendant has moved to dismiss, or, in the alternative, for summary judgment, on the alleged basis that Martin failed to exhaust his post-termination administrative remedies prior to filing suit. After carefully considering the parties' submissions, and based on the following analysis, the Court concludes

that the Defendant is entitled to summary judgment for the reason that Martin did not exhaust his administrative remedies.[1]

II. BACKGROUND

In 1986, Martin was hired by the Defense Contract Audit Agency ("DCAA"), a component of the Department of Defense. He was terminated from his position as a contract auditor effective May 17, 1991.

Martin asserts two claims. First, he claims that his employer refused to accommodate his handicap of sleep apnea. More specifically, Martin says that he was severely beaten in 1967 while he was in the Army. Deposition of Rene J. Martin, attached as Exhibit 1 to Dkt. 54 ("Martin Deposition"), at 53. As a result of this beating, Martin says he developed a condition knows as sleep apnea. Martin Deposition at 54. However, Martin states that he did not become aware that he had this condition until 1989. *Id.* He underwent corrective surgery in October of that year. *Id.* Martin claims he met with his manager and supervisor the next month and requested retraining. *Id.* at 54-56. Martin says he explained that retraining was necessary because his sleep apnea had caused him to forget much of what he had been taught by the DCAA during the prior three years. *Id.* at 54. According to Martin, he was told that he would not

---

[1]Since the Court has considered materials outside the pleadings in reaching its decision, summary judgment, rather than dismissal, is the proper procedural mechanism for disposing of this case. *See, Wade v. Secretary of Army*, 796 F.2d 1369, 1375 n.8 (11th Cir. 1986). The material facts regarding the exhaustion issue are not in dispute.

receive any retraining, and that he would perform audits as directed or he would be terminated. *Id.* at 56.[2] Martin characterizes the alleged refusal to provide retraining as handicap discrimination.

Martin's second claim is that he was terminated in retaliation for having filed a workers compensation claim. Martin says that in June 1990, he slipped on a slime-covered sidewalk at an Air Force base. *Id.* at 58-59. While at the base hospital, Martin filled out workers compensation paperwork. *Id.* at 59. Martin returned to work the next day. *Id.* Martin says his supervisor and the assistant branch manager came into his office and suggested that he not file a workers compensation claim. *Id.*[3] Martin claims that he was terminated because he filed that claim.

On May 14, 1991, Martin acknowledged receipt of a memorandum (dated the previous day) informing him that he was being terminated for unsatisfactory performance, effective May 17, 1991. In pertinent part, the memorandum stated:

> You have the right to appeal this action to the Merit Systems Protection Board, Atlanta Regional Office, 401 West Peachtree Street, N.W., 10th Floor, Atlanta, Georgia 30308, using the procedures in Enclosure 1 to this memorandum. An appeal to the Board must (a) be in writing, (b) give your reason(s) for contesting the action, with such offer of proof and pertinent documents as you are able to submit, (c) state whether you desire a hearing in connection with your appeal, and (d) be delivered to the Board, in person or by certified mail, no later than twenty calendar days after the

---

[2]The Defendant denies this allegation. *See*, Exhibits 3-5 to Dkt. 54.

[3]The Defendant disputes this allegation, as well. *See*, Exhibits 3-4 to Dkt. 54.

> **effective date of the action.** Enclosure 2 is an appropriate appeal form.
>
> If you belive [sic] that this action is being taken for any discriminatory reason, you have the right to file an Equal Employment Opportunity (EEO) complaint. Procedures for filing a complaint are contained in Chapter 46 of the DCAA Personnel Management Manual. If you elect to file a complaint of discrimination, you must contact one of the EEO counselors listed in Enclosure 3 within thirty calendar days after the effective date of the removal to begin the complaint process. **You may not file both an EEO complaint and an appeal with the Merit Systems Protection Board (MSPB) concerning this action. Where you first file will determine how this matter will be processed.** Should you elect to file a complaint of discrimination, your complaint will be processed in accordance with EEOC Regulations at 29 CFR, Part 1613, Subpart D. Should you elect to file an appeal, your appeal will be processed in accordance with MSPB Regulations at Enclosure 1.
>
> Should you decide to appeal this action, Ms. Charlotte K. Potts, Personnel Management Specialist, telephone (404) 590-6890, located at 805 Walker Street, Suite 103, Marietta, Georgia 30060, will provide you with any additional information you may need regarding the appeals procedure. Copies of pertinent regulations will also be made available to you by Ms. Potts.

May 13, 1991 Memorandum for Mr. Rene J. Martin, Space Coast Branch Office, Exhibit 2 to Dkt. 54 ("termination memorandum"), at 11-12 (emphasis supplied).

By means of the termination memorandum, Martin was thus notified that he could challenge his termination by means of an MSPB appeal within 20 days of the effective date of his termination, or by means of an EEO complaint within 30 days, but that he could not pursue his grievance through both avenues. The memorandum further informed Martin that if he elected to file an MSPB appeal, he was required to deliver his appeal to MSPB's Atlanta Regional Office, the

address of which was provided in the memorandum. Since the effective date of Martin's termination was May 17, 1991, the deadline for filing an MSPB appeal was June 6, 1991.

On the same day that the appeal was due to be delivered to the MSPB's Atlanta office, Martin's attorney's secretary/paralegal sent the appeal by overnight courier. However, she did not send the appeal to the MSPB's Atlanta office, as directed by the termination memorandum; rather, she sent it to DCAA's regional office in Marietta, Georgia. The appeal was delivered to DCAA on June 7, 1991. That day, DCAA Marietta sent the appeal to DCAA's legal counsel in Virginia, who received it on June 10, 1991. The same day he received it, DCAA counsel returned the appeal to Martin's attorney, along with an explanation that the MSPB's Atlanta Regional Office, and not the DCAA, was the proper place to file the appeal. Martin's counsel received the document on June 17, 1991, and filed an appeal with MSPB Atlanta the next day. Meanwhile, Martin himself went to an EEO counselor on June 17, 1991, and eventually filed an EEO complaint with the DCAA on July 22, 1991.

The MSPB dismissed Martin's appeal as untimely, finding that he had not shown good cause for waiver of the filing deadline. *See*, Exhibit 2 to Dkt. 9. The MSPB subsequently denied Martin's petition for review, Exhibit 3 to Dkt. 9, whereupon Martin appealed to the United States Court of Appeals for the Federal Circuit. That court affirmed the MSPB's decision, ***per curiam*** and without opinion. ***Martin v. Merit Systems Protection Board***, 976 F.2d 746 (Fed. Cir. 1992).

The DCAA rejected Martin's separate EEO complaint on the basis that, having first elected to pursue his appeal with the MSPB, Martin could not also challenge his termination by means of an EEO complaint. Martin appealed the agency's decision to the EEOC, which affirmed the rejection. *See*, Exhibit 1 to Dkt. 9. On March 23, 1994, the EEOC denied Martin's request for reconsideration. *See*, Exhibit 4 to Dkt. 9. Martin filed suit in this Court the following month.

III. RELEVANT LAW

The following discussion of exhaustion of administrative remedies is pertinent to the Court's analysis of the issue in this case:

> [A] district court must determine whether [a federal] employee has complied with regulatory requirements when the defendant raises the issue of failure to exhaust administrative remedies. In conducting this inquiry, the court should first ascertain what the regulations require of a complaining employee. It should then ask whether the complainant made a good faith effort to comply with the regulations and, particularly, to provide all the relevant, specific information available to him or her. No deference may be accorded the agency or complaints examiner's findings with respect to the employee's compliance. An evidentiary hearing may be necessary to determine compliance or lack of it.
>
> * * *
>
> The court must keep in mind that the purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires. If the employee is hampered by the actions of the agency or complaints examiner or by the unavailability of any discovery procedures, he or she should not be deemed

thereby to have failed to comply with exhaustion requirements.

> Should the court determine that the employee did all he or she could reasonably be expected to do to comply with the regulations, and that the reason given by the agency does not support its decision to reject the complaint, the question will arise whether the court must dismiss the complaint to allow the employee to present the merits of the...discrimination claims to the agency. We conclude that the policies underlying the exhaustion requirement mandate that the agency has only one opportunity to decide the issue.
>
> * * *
>
> [U]pon determining that the employee in fact complied with the regulations (or was prevented by the agency from doing so) and that the agency therefore rejected the...complaint without cause, the court should not direct the employee...to return to the agency to give the agency a second opportunity to resolve the dispute but should conclude that administrative remedies are exhausted and go on to try all issues in the case on their merits. Of course, if the court determines that the employee did not properly present his or her claims so as to afford the agency an opportunity to resolve the dispute, then summary judgment in favor of the defendant is in order. Resort to the district court protects employees, while ensuring that they are not encouraged to circumvent administrative processes.

Wade v. Secretary of Army, 796 F.2d 1369, 1376-78 (11th Cir. 1986) (citation omitted).

In order to satisfy the exhaustion requirement, the claimant must comply with the administrative agency's procedural requirements. *Johnson v. Bergland*, 614 F.2d 415, 417-18 (5th Cir. 1980). More specifically,

> 'The administrative complaint procedures must be complied with. If they are, and an adverse decision is rendered on the merits of a complaint, then a complainant is entitled to a *de*

> *novo* hearing in federal court. However, if the agency does not reach the merits of the complaint because the complainant fails to comply with the administrative procedures the Court should not reach the merits either. Otherwise, the complainant might be dilatory at the administrative level, knowing that he can get into federal court anyway.'

Id. (quoting district court's opinion, with approval; citation omitted); *see also, Wade*, 796 F.2d at 1376 (following *Johnson*).

IV. ANALYSIS

The Court determines that the MSPB and the EEOC correctly refused to reach the merits of Martin's claims.

With respect to the MSPB appeal, Martin failed to timely file the appeal and, further, did not demonstrate good cause for the failure to meet the filing deadline. Specifically, the MSPB determined that the misdirection by Martin's counsel's secretary did not constitute excusable neglect, and rejected Martin's argument that the DCAA was "in some way culpable for the delay because it did not call [Martin] when it received the misdirected appeal on June 7, 1991." Exhibit 2 to Dkt. 9 at 3. Concerning the latter point, the MSPB stated:

> What [Martin] fails to appreciate...is that the [DCAA] was under no obligation to call him, and even if it had, the appeal would still have been untimely since the deadline for filing was June 6th. The agency met its obligation when it spelled out in the decision letter where and when an appeal to the Board had to be filed. [Martin], by waiting until the last moment and relying on his representative to properly file the appeal, must bear the unfortunate consequences of his actions with respect to the handling of his appeal.

Id.

In reaching its decision that Martin had not shown good cause, the MSPB relied on *Phipps v. Department of the Air Force*, 45 M.S.P.R. 375 (M.S.P.B. 1990). The Court recognizes that well after the MSPB's decision on Martin's appeal became final, the MSPB overruled *Phipps* in some respects. *Sanford v. Department of Defense*, 61 M.S.P.R. 207, 210 (M.S.P.B. 1994). However, the pertinent inquiry is not the current state of the law on this point, but whether the MSPB correctly applied the law in effect at the time of its decision. The Court concludes that the MSPB did so.

Further, *Sanford* is distinguishable from the instant case in one critical respect: in *Sanford*, the MSPB reaffirmed the general rule that "an appellant's failure to follow explicit filing instructions does not constitute good cause for any ensuing delay." *Id.* at 209. However, the MSPB declined to follow the general rule based on its finding that Sanford had "shown good cause for the brief delay [in filing the appeal with the MSPB] where he filed with the personnel office of his employing agency *within the 20-day regulatory time limit* and then filed with the [MSPB] as soon as he learned of his mistake." *Id.* at 210 (emphasis supplied). Hence, in *Sanford*, the claimant filed timely, but with the wrong office. In the instant case, by contrast, Martin filed *untimely* and with the wrong agency. This distinction renders *Sanford* inapposite.

The MSPB also relied on another decision, *Miller v. Department of the Army*, 43 M.S.P.R. 228 (M.S.P.B. 1990), in determining that Martin did not show good

cause for his untimely filing. After Martin's appeal became final, the Court of Appeals for the Federal Circuit reversed *Miller*. *Miller v. Department of the Army*, 987 F.2d 1552 (Fed. Cir. 1993). This development likewise does not alter this Court's conclusion that the MSPB correctly dismissed Martin's appeal. *Miller* is distinguishable from the instant case in the same manner as *Sanford*. In *Miller*, the claimant had timely filed her appeal, but with the wrong agency. In the instant case, Martin's appeal was both untimely and misfiled.

Concerning the EEO claim, Martin relinquished the right to pursue that claim of discrimination by virtue of his prior pursuit of the MSPB appeal. Martin filed his MSPB appeal on June 18, 1991. Although he sought EEO counseling on June 17, 1991, he did file a formal EEO claim until July 22, 1991. The DCAA and the EEOC correctly determined that Martin's EEO complaint was commenced on the day it was filed, not on the date Martin first sought EEO counseling. 29 C.F.R. § 1613.403. By filing his MSPB appeal first, Martin foreclosed his right to challenge his termination by means of an EEO complaint. 29 C.F.R. §§ 1613.403 & 1613.405. In light of that fact, the DCAA properly rejected Martin's EEO complaint, and the EEOC correctly affirmed that decision.

The Court further determines that Martin did not do everything he reasonably could have done to comply with the agencies' procedural requirements. Martin's attorney's employee waited until the day the MSPB appeal was due to place the appeal in the hands of a courier, thus preventing it from being timely filed. To further compound the problem, despite the clear

instructions in the termination memorandum concerning the address to which an MSPB appeal was to be delivered, the secretary/paralegal sent the appeal to the DCAA, rather than to the MSPB. Had Martin's representative not waited until the last minute to send the appeal, the mistake in sending it to the wrong agency might have been corrected in time for it to have been timely filed with the proper agency. Further, Martin's counsel sent the appeal in such a manner that it would have arrived a day late in any event. In the Court's view, this lack of diligence is inexcusable.

Martin characterizes the DCAA's conduct in handling the misdirected MSPB appeal as essentially holding the appeal "hostage," so that by the time it was returned to Martin's counsel, he would not have time to timely file an EEOC complaint. The Court rejects this argument, as did the EEOC. *See*, Exhibit 4 to Dkt. 9 at 4 ("Nor do we find probative evidence demonstrating that the agency improperly detained appellant's documentation relating to his MSPB appeal for a 10 day period"). The record reflects that on the same day DCAA Marietta received the MSPB appeal, it sent the appeal to DCAA's counsel in Virginia. On the same day that DCAA's counsel received the appeal from DCAA Marietta, it returned the document to Martin's counsel. *See*, Exhibit 2 to Dkt. 9.

Again, the problem of misdirection was compounded by the fact that Martin's counsel waited until the eleventh hour to send the appeal. Had Martin's attorney sent the appeal earlier, the misdirection might have come to light in time for him to timely file the appeal with the proper agency. Further, since

Martin's representative sent the appeal in such a manner that it would arrive a day late in any event, DCAA's handling of the already untimely appeal was legally inconsequential.

V. CONCLUSION

Based on the foregoing, the Court concludes that Martin failed to exhaust his administrative remedies before filing this suit. In light of this conclusion, the Court need not reach the Defendant's remaining arguments. Accordingly, it is ORDERED as follows:

1. The Defendant's Motion to Dismiss or In the Alternative, Motion for Summary Judgment (Dkt. 54) is GRANTED insofar as it seeks summary judgment based on the Plaintiff's failure to exhaust administrative remedies.

2. The Clerk shall promptly enter a final judgment providing that the Plaintiff, Rene J. Martin, shall take nothing on his claims against the Defendant, William J. Perry, and that the Defendant shall recover his costs of action.

3. The Clerk shall close the file.

4. Any other pending motions are denied as moot.

DONE AND ORDERED in Chambers in Orlando, Florida, this 9th day of January, 1996.

ANNE C. CONWAY
United States District Judge